Supreme Court, U.S.
FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-587

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES RICHARD SCARCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to an order holding him in contempt and incarcerating him for refusing to testify before a federal grand jury has been rendered moot by petitioner's release from custody.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 5 F.3d 397. The opinion of the district court denying petitioner's motion to quash the grand jury's subpoena (Pet. App. A2, at 1-2), the order of the district court finding petitioner in contempt and ordering him incarcerated (Pet. App. A3), and the order of the district court releasing petitioner from custody (App., *infra*, 1a-2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1993. On August 3, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 24, 1993, and the

petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After receiving immunity pursuant to 18 U.S.C. 6002, petitioner was subpoenaed to appear before a grand jury in the Eastern District of Washington. The grand jury was investigating a break-in and vandalism, apparently by animal rights activists, at Washington State University. Petitioner, a Ph.D. candidate in sociology at the university who studies animal rights activists, moved to quash the subpoena, asserting that he could not be compelled to disclose the information sought by the grand jury based on a "scholar's privilege" protected by the First Amendment. Pet. App. A2, at 1-2; see *In re Grand Jury Proceedings*, 5 F.3d 397, 398-399 (9th Cir. 1993).

The district court denied the motion to quash. Pet. App. A2, at 1-2. The court held that petitioner had no privilege under the First Amendment to refuse to provide relevant testimony to the grand jury. *Ibid.* Petitioner then appeared before the grand jury and answered questions of a general nature, but he refused to answer questions relating to a conversation that he had one day after the break-in with Rodney Coronado, a suspect in the vandalism. 5 F.3d at 399.

On April 6, 1993, after hearing additional argument on petitioner's claim of privilege, the district court ordered petitioner to answer the grand jury's questions. Petitioner refused. The district court then found petitioner in contempt of court and ordered him incarcerated pursuant to 28 U.S.C. 1826. Pet.

App. A3; 5 F.3d at 399. The district court stayed its order pending appeal. Pet. App. A3.

2. The court of appeals affirmed the district court's finding of contempt in a summary order entered on May 6, 1993. Pet. App. A1. The order stated that "[a] written disposition will follow." *Ibid.* Petitioner was incarcerated on May 14, 1993. Pet. 8.

On September 17, 1993, the court of appeals issued a written opinion explaining its reasons for affirming the district court's incarceration order. The court assumed without deciding "that scholarly inquiry enjoys the same freedom of press protection that traditional news gathering does, and that [petitioner's] contact with his informants was incident to such work," but it nevertheless concluded that "the privilege to which [petitioner] lays claim by analogy simply does not exist." 5 F.3d at 399. The court noted that *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), held that "news gatherers are not exempt from the duty imposed on any other citizen to 'respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.'" 5 F.3d at 400 (quoting *Branzburg*, 408 U.S. at 690-691).

The court of appeals concluded that "[t]he circumstances of the present case fall squarely within those of *Branzburg*." 5 F.3d at 400. The court found that petitioner had never argued that "the [grand jury] questions were posed in bad faith, that they had a tenuous relationship to the subject of the investigation, that law enforcement did not have a legitimate need for the information, or that they were posed as a means of harassment." *Ibid.* Accordingly, under *Branzburg*, petitioner had no First Amendment privilege to refuse to answer the grand jury's questions.

The court rejected petitioner's argument that, in view of Justice Powell's concurring opinion, *Branzburg* must be read to require a case-by-case balancing of the government's need for the information sought against the reporter's First Amendment interests. 5 F.3d at 400-402. The court explained that Justice White's opinion for the Court in *Branzburg* was joined by five Justices, including Justice Powell, and that it was therefore the opinion of the Court. Moreover, Justice Powell's concurring opinion "does not suggest that in each case there must be balancing of the particular information sought versus the newsman's request for confidentiality." *Id.* at 401. Accordingly, the court declined to accept petitioner's proposed balancing test, which "is at odds with the majority opinion [in *Branzburg*] itself." *Id.* at 400.

Finally, the court of appeals held that federal common law does not create a "scholar's privilege." 5 F.3d at 402-403. The court explained that recognition of such a privilege in the grand jury context would run afoul of *Branzburg*. The court distinguished the cases relied upon by petitioner, noting that "those cases did not involve grand jury inquiries," *id.* at 403, and that no court "that we have discovered * * * has actually recognized a scholar's privilege to withhold from a federal grand jury confidentially obtained information which is relevant to a legitimate grand jury inquiry and sought in good faith." *Ibid.*

3. On October 19, 1993, while the petition for a writ of certiorari was pending, the district court ordered petitioner released from confinement. The court found that "further incarceration is not likely to result in [petitioner's] giving testimony to the grand jury in response to the subpoena issued by the grand

jury and, for that reason, further incarceration would have no coercive effect and would therefore be punitive in nature." App., *infra*, 1a. The United States did not appeal from that order. Petitioner has now been released from custody.

ARGUMENT

Petitioner renews his claim (Pet. 9-16) that he had a First Amendment and federal common law privilege to refuse to answer the grand jury's questions regarding the break-in at Washington State University. Because petitioner has been released from custody, however, this case is moot.

1. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988); see *De Funis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). A case becomes moot if the court before which the matter is pending cannot grant any effective relief to the party seeking relief, see *Mills* v. *Green*, 159 U.S. 651, 653 (1895), or when the matter presents a "question[] that cannot affect the rights of litigants in the case" before the court. *De Funis*, 416 U.S. at 316. "It is not enough that a controversy existed at the time the complaint was filed." *Deakins* v. *Monaghan*, 484 U.S. at 199. "The parties must continue to have a '" personal stake in the outcome" ' " at all stages of a case. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990).

Petitioner's appeal seeks relief from the district court's order under 28 U.S.C. 1826 incarcerating him for refusing to testify after being given immunity. Now that the district court has released petitioner,

he is no longer suffering incarceration for refusing to testify. The court's order therefore effectively lifts the finding of contempt and disposes of any need for relief from the contempt order. Accordingly, there is no longer an ongoing controversy between the parties, and the case is moot.

This is not a case that presents an issue "capable of repetition, yet evading review." See *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). That exception to the mootness doctrine applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). Petitioner has no reasonable expectation that he will again be incarcerated for failure to answer the grand jury's questions.

In ordering petitioner's release, the district court found that "further incarceration is not likely to result in [petitioner's] giving testimony to the grand jury." App., *infra*, 1a. There is no reason to believe that if petitioner were again subpoenaed before the grand jury, the district court would take a different view. Moreover, the Department of Justice has a policy of not resubpoenaing a grand jury witness who has been previously incarcerated for refusing to testify before the same or a prior grand jury on the same subject. See U.S. Attorneys' Manual § 9-11.160, at 14 (1988). Thus, petitioner is unlikely to face renewed incarceration for his refusal to testify.

2. Even if petitioner's claims were not moot, they would not warrant review. Petitioner contends (Pet. 9-16) that the First Amendment and federal common

law give researchers a qualified privilege to refuse to disclose information obtained from confidential sources. This Court held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), however, that journalists have the same obligation as other citizens to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 690-691. Although the Court acknowledged that "news gathering is not without its First Amendment protections," it made clear that journalists could refuse to respond to a grand jury subpoena only when a grand jury investigation is "instituted or conducted other than in good faith." *Id.* at 707; see also *id.* at 709-710 (Powell, J., concurring) (journalists may have a privilege to refuse to respond to a subpoena issued in bad faith). Petitioner makes no claim that the government is conducting the grand jury investigation in bad faith or that it seeks to harass petitioner by subpoenaing him to testify before the grand jury. Accordingly, petitioner had no right to refuse to answer the grand jury's questions, and the district court properly held him in contempt.

Petitioner errs in contending (Pet. 9-11 & n.5) that the decision below conflicts with cases holding that journalists have a qualified privilege under the First Amendment and federal common law to refuse to divulge information in criminal cases unless the party seeking the information shows that (1) the information sought is material and relevant; (2) the information cannot be obtained by other means; and (3) the party has a compelling interest in obtaining the information. See, *e.g.*, *La Rouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986); *United States* v. *Burke*,

700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Cuthbertson*, 630 F.2d 139, 146-147 (3d Cir. 1980), cert. denied, 454 U.S. 1056 (1981). None of the court of appeals decisions on which petitioner relies involved a journalist who was seeking to assert a qualified privilege in response to a grand jury subpoena.[1] As the court below recognized (5 F.3d at 400, 402-403), extension of those cases to the grand jury context would be squarely inconsistent with the holding in *Branzburg*. On the facts of this case, therefore, there is no conflict, and further review is not warranted.

Moreover, the government would prevail in this case even under the standard urged by petitioner. The grand jury sought to question petitioner regarding a conversation that he had with a principal suspect of a crime within a day of the commission of that crime. The questions posed to petitioner were highly relevant to the government's inquiry and bore a direct relationship to the subject of the investigation. Moreover, as the court of appeals stated, petitioner never argued "that the [grand jury's] questions were posed in bad faith, that they had a tenuous relationship to the subject of the investigation, that law enforcement did not have a legitimate need for the information, or that they were posed as a means of harassment." 5 F.3d at 400. Accordingly, even if

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[1] Petitioner erroneously identifies *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc), as a case in which a court of appeals recognized a reporter's privilege in the grand jury context. Pet. 10 n.5. That case has no precedential value, because the court of appeals did not issue an opinion but instead simply affirmed the judgment of the district court by an equally divided vote.

petitioner is correct that "scholars" enjoy a qualified privilege under federal common law or the First Amendment, petitioner has not presented a colorable claim that he is entitled to invoke that privilege.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993

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[2] Because petitioner's claims on the merits are not worthy of review, the procedure applicable to cases that become moot while pending on appeal or in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)), is inapplicable, and certiorari should simply be denied. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Magistrate No. 93-0041A-01

IN RE: JAMES RICHARD SCARCE, RESPONDENT

[Filed Oct. 19, 1993]

ORDER

This matter is before the court on respondent's Motion to Vacate Contempt Order which has been taken under consideration by the court without hearing and without oral argument. The court having reviewed the documents on file and being thoroughly familiar with this matter finds as follows:

1. The respondent, James Richard Scarce, has been incarcerated in the Spokane County Jail since May 14, 1993 upon a finding of civil contempt for refusing to testify before a grand jury in this district.

2. It has become obvious to the court, and the court so finds, that further incarceration is not likely to result in the respondent giving testimony to the grand jury in response to the subpoena issued by the grand jury and, for that reason, further incarceration would have no coercive effect and would therefore be punitive in nature. *See* 28 U.S.C. § 1826 and *Simkin v. United States*, 715 F.2d 34 (2nd Cir. 1983). Now, therefore,

IT IS ORDERED that respondent's Motion for Release from Non-Coercive Confinement, Ct. Rec. 35, be and the same is hereby **GRANTED**. Respondent shall be released from incarceration immediately.

The Clerk is directed to file this Order, forward copies to counsel and forward a copy to the United States Marshal's Office for immediate action.

DATED this 19[th] day of October, 1993.

/s/ WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE